This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 10/29/02.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
LINDY LAWRENCE,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 1999SF0468
	)	EEOC NO: 21B991183
NORMAN M. RUBIN, D.D.S.,	)	ALS NO: S-11139
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On October 10, 2001, a public hearing commenced in this matter. After the presentation of Complainant's case-in-chief, Respondent's motion for a directed finding was granted. Complainant then filed a motion for reconsideration and Respondent filed a response. Complainant's reply to Respondent's response was received on February 11, 2002. As such, this case is ready for decision.

Contentions of the Parties

Respondent contends the case should be dismissed because Complainant failed to establish a *prima facie* case of either sexual harassment or handicap discrimination at the close of her case-in-chief. Complainant disagrees and further contends she should be provided with a full hearing on the merits.

Findings of Fact

The following facts are those, after having considered all of the evidence in the record, I found were proved by a preponderance of the evidence. Assertions made in the record which are not addressed in this decision were determined to be unproven or immaterial to this determination.

1. On March 8, 1999, Complainant filed a charge of discrimination against Respondent with the Illinois Department of Human Rights.

2. The Department filed a two count Complaint of Civil Rights Violation on December 29, 1999 alleging in part that:

> ***Count I*** Respondent sexually harassed Complainant in that he repeatedly asked Complainant for dates, made sexual innuendoes, brushed his body against hers, rubbed Complainant's shoulders and hair, and talked about the details about the relationship with his ex-wife;
>
> ***Count II*** Complainant has a physical handicap of endometriosis; and on or about November 1, 1998 Respondent discharged Complainant and stated he could not have an employee who was sick and had to go to the doctor all the time.

3. Respondent timely filed an answer to the complaint on January 28, 2000.

4. Respondent is a solo practitioner dentist who employs a staff of two people other than himself. The staff consists of a receptionist and a dental assistant.

5. Respondent employed Complainant as a receptionist from August 28, 1998 to October 25, 1998.

6. During Complainant's five weeks of employment, Respondent talked about his personal life, including his sexual relationship with his ex-wife, in the office in the presence of Complainant, the other employee, and his patients.

7. On one occasion, Respondent asked both of his employees to go out after work for a drink. Complainant declined.

8. On occasion, Respondent would tell his employees they looked nice, their hair style was sexy, or that he liked the smell of perfume in the office.

9. Respondent informed Complainant that he wanted her to "dress more business like." Accordingly, she chose to wear hospital scrubs and Respondent purchased the scrubs for both Complainant and the other employee of the dental practice.

10. On one occasion, Respondent requested that Complainant and his other employee

sit on his lap. Both declined the offer and Respondent unsuccessfully attempted to grab Complainant's arm as she walked away.

11. Complainant and her co-worker often went to lunch with Respondent and Respondent paid for lunch. They engaged in office related conversation and conversation of a general nature. However, during one lunch period, Respondent commented that he purchased new bedroom furniture and that he would like to get a receptionist into it.

12. Respondent asked Complainant to go to a concert with him and she declined.

13. At 11:30 p.m. on an unspecified date in October of 1998, Complainant went to the emergency room with pain in the lower right side of her stomach. She was released from the ER at 7:00 a.m. the following morning and called in sick to work that day. She returned to work the following day under the effects of narcotic pain medication.

14. If Complainant was out of the office, Respondent had to answer the phones, schedule patients, and treat patients during the same day. Complainant was absent from work at least once a week.

15. Complainant informed Respondent she might undergo a diagnostic laparoscopy procedure and informed him she would be out of the office for three days. However, Complainant never had the procedure performed to diagnose the cause of her stomach pain.

16. Three days after her emergency room visit, Complainant called Respondent at home to confirm an after business hours dental teeth cleaning for the staff. Respondent then met Complainant and the other employee at the office to clean their teeth and terminated Complainant.

Conclusions of Law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant is an "employee" within the meaning of section 2-101(A)(1) Illinois Human Rights Act.

3. At the time of the alleged incidents, Respondent was an “employer” within the meaning of section 2-101(B)(1)(b) and was subject to the provisions of the Act.

4. Complainant failed to establish a *prima facie* case of sexual harassment in that Complainant failed to prove by a preponderance of the evidence that Respondent's conduct was sexual in nature and had the purpose and effect of creating an intimidating, hostile or offensive work environment.

5. Complainant failed to establish a *prima facie* case of handicap discrimination in that Complainant failed to prove by a preponderance of the evidence that she was handicapped as defined by 775 ILCS 5/1-103 of the Illinois Human Rights Act.

6. Respondent terminated Complainant from his employ for reasons other than a physical handicap.

Determination

Complainant's case should be dismissed with prejudice because she failed to establish a *prima facie* case of sexual harassment or handicap discrimination during her case-in-chief.

Discussion

In this case, Complainant alleged she was a victim of sexual harassment that created a hostile work environment at her place of employment, and that she was terminated on the basis of her physical handicap, endometriosis. However, during the public hearing, and at the close of Complainant's case-in-chief, Respondent's motion for a directed finding was preliminarily granted. Shortly thereafter, Complainant filed a motion to reconsider the directed finding.

In order to determine the propriety of the directed finding, I "…must determine whether the complainant [ ] presented some evidence on every essential element of…

her claim." If Complainant did not do so, then it was proper for me to grant the motion for a directed finding. However, if Complainant did present some evidence on each element of her claim, then I must weigh the evidence to determine if the *prima facie* case has been negated. ***Castle v. SOI, Illinois Veterans Home at Manteno***, __Ill. HRC. Rep.___ (Charge No. 1989CF1805, June 29, 1995). In that process, if I find that Complainant did not establish a *prima facie* case of sexual harassment and handicap discrimination, then the directed finding in Respondent's favor was proper.

Sexual harassment

The Act defines sexual harassment as follows:

> "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. ***775 ILCS 5/2-101(E)***.

Complainant did not plead or present evidence at hearing relating to subparagraphs one and two above. By definition then, liability would only attach to Respondent if Complainant established that: 1) unwelcome conduct of a 2) sexual nature 3) created an intimidating, hostile, or offensive working environment. ***Kauling-Schoen v. Silhouette Health Spas***, ___ Ill. HRC Rep. ____ (Charge No. 1986SF0177, Order and Decision February 8, 1993), slip op. at 9. At hearing, Complainant failed to establish that Respondent's conduct was of a sexual nature and failed to present evidence that the conduct was abusive enough to alter the conditions of her work environment.

The Commission has held that there is no bright line test to determine what type of behavior establishes liability for sexual harassment. Instead, it charged the administrative law judge to consider not only Respondent's actions in the workplace, but

also to consider those actions in relation to the specific behavior of the individuals within the workplace. ***Robinson v. Jewel Food Stores***, 29 Ill. HRC. Rep. 198, 204 (1986). Initially though, Complainant must establish the threshold element of her *prima facie* case which is: was Respondent's behavior toward her "conduct of a sexual nature?"

The record before me at hearing established that Respondent: 1) asked both of his employees, not just Complainant, to go out to a bar after work; 2) frequently took the employees to lunch to discuss work, but made a single isolated comment about his wish to get a receptionist into his new bedroom furniture; 3) asked if either one of his employees would sit on his lap, and when they refused he did not force them to do so; 4) asked Complainant to go to a concert with him. She declined and suffered no repercussion for declining the offer of the concert; 5) attempted to massage the shoulders of his employees, but ceased when they told him to stop; 6) spoke freely, in front of staff and patients, about his personal life and a past sexual relationship; and finally; 7) told his employees they looked nice or that their hair looked sexy. All of those actions viewed separately or as a whole are too tepid to rise to the level of conduct of a sexual nature.

It is safe to say Complainant established that Respondent did not conduct himself professionally in the dentist office. Taken individually or together Complainant did not establish anything more than conduct that can be interpreted as highly inappropriate, and flirtatious at best. However, flirtatious conduct does not rise to conduct of a sexual nature. See, ***Cates v. DCFS***, ___ Ill. HRC. Rep.____ , Charge No. 1988SF0268, December 17, 1991).

In reviewing the nature of the Respondent's conduct as a whole, I found that Respondent's comments about Complainant's hairstyle and dress were innocuous, as was the attempt at grabbing her arm. Nothing was presented to convince me otherwise. Additionally, the comment made in the restaurant in which Respondent refers to getting

a receptionist into his new bedroom furniture was too vague in nature to amount to a sexually suggestive comment. Finally, Respondent's occasional statements about his sexual trysts with his ex-wife were not directed at Complainant or her co-worker. They were merely inappropriate banter for the office, and were sometimes said in front of patients. In short, the actions of Respondent in this case pale in comparison to the types of conduct that the Commission has traditionally found to violate the Act.

Even if Complainant could have established that Respondent's conduct was sexual in nature, she still had to prove that the conduct was severe and pervasive enough to alter her working environment. The U.S. Supreme Court has held, and the Commission has followed, that a respondent's conduct in the workplace must be viewed objectively and subjectively. That is, Complainant must prove she found her workplace environment abusive and that a reasonable person would have also found the workplace abusive. If both standards are not met, then the Act has not been violated. ***Harris v. Forklift Sys., Inc.,*** 510 U.S. 17, 126 L. Ed. 2d 295, 114 S.Ct. 367, 370 (1993); ***Barlow v. Cook County Dep't of Corrections & Michael Figliulo,*** ___ Ill. HRC Rep. ____ , slip op. at 19. (Charge No. 1993CF2498, April 30, 1998).

For a claim of sexual harassment to be actionable, in was incumbent upon Complainant to show that her workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working relationship." ***Harris v. Forklift Sys., Inc.,*** 114 S. Ct. 367, 370(1993); ***Schmitt v. Adams Co. Hwy. Dept***., __ Ill. HRC Rep. (Charge No. 1995SF0053, January 13, 1998). Here, the record establishes that Complainant was undoubtedly offended by Respondent's comments and found his physical advance of grabbing her arm unpleasant. However, it was clear to me at hearing that she did not find her working environment to be permeated with discriminatory sexual conduct because she never asked Respondent to cease his

behavior. In fact, she even contacted Respondent at home to verify he would meet her after business hours to clean her teeth. This is not the action of a complainant who finds herself victim of an abusive employment relationship.

Next, Complainant's co-worker who testified on her behalf at hearing, stated that she too did not determine Respondent's actions to be abusive. The co-worker felt Respondent's actions and workplace discussions were sometimes inappropriate. However, she determined that Respondent was generally a nice person, but just unpleasant to work for because he had a bad temper and a demanding work ethic. In fact, the co-worker testified she no longer worked for Respondent because she found a better job where she would not have to tolerate Respondent's temper and degrading attitude. The co-worker made it very clear that she did not leave the job because it was a sexually hostile workplace. She even noted for the record that Respondent still remained her dentist.

Viewing Respondent's conduct objectively in totality with the workplace environment, a reasonable person would not determine Complainant's workplace to be hostile in nature, just unprofessional and difficult. For the reasons discussed above, in viewing the facts in the light most favorable to Complainant, I cannot say with certitude that she established the necessary elements of her *prima facie* case in order to prevail or even to proceed to a full hearing on the merits. As such, a directed finding on the claim of sexual harassment was proper.

Handicap discrimination

Next, in order to survive a directed finding on the issue of handicap discrimination Complainant must establish: (1) she is handicapped within the definition of the Act; (2) her handicap is unrelated to her ability to perform her job or, if the handicap is related to the ability to perform, after a request, the employer failed to make a reasonable accommodation necessary for her job performance; and (3) an adverse job action was

taken against complainant related to her handicap. See, ***Cabral and Moen Inc***., __ Ill. HRC. Rep.__ , (Charge No 1996CF1003, November 2, 1999).

In this case, Complainant's claim of handicap discrimination based on her condition of endometriosis failed to meet the threshold *prima facie* requirement as set forth above. That is, she had to establish that she suffered a handicap as defined by the Illinois Human Rights Act. Under the Act and the Illinois Administrative Code, an individual is considered handicapped if she has: 1) a determinable physical characteristic 2) resulting from "disease, injury, congenital condition of birth or functional disorder and which 3) is unrelated to her ability to perform the duties of a particular job. See, ***56 Ill. Admin Code 2500.20.***

In his response to the motion for reconsideration, Respondent argues that one reason Complainant's case must fail is because her claimed condition of endometriosis is not a handicap. To support his argument, Respondent mistakenly relies on the U.S. Supreme Court's decision in ***Toyota Motor Manufacturing v. Williams***, 122 S. Ct. 681, 70 USLW 4050 (2002) which held that endometriosis is not a handicap as defined under the *Americans* w*ith Disabilities Act*. While federal precedent may be persuasive, I am bound by Commission precedent and Illinois case law interpreting the *Illinois Human Rights Act,* which has a different legal definition of handicap. Therefore, this case must be analyzed under the definition of "handicap" as provided in the Illinois Human Rights Act. As such, my review of the relevant Illinois case law and Commission precedent on this issue leaves no room for doubt that endometriosis is a handicap for purposes of the Act. See, ***Illinois Bell Telephone v. Illinois Human Rights Commission***, 190 Ill. App. 3d 1036, 547 N.E. 2d 499, 138 Ill. Dec. 332 (1st Dist. App. Ct. 1989).

However, the issue of whether endometriosis is considered a handicap is not determinative of Complainant's case. The fatal blow to her case at hearing was the fact that she did not present any evidence to establish that she had actually been *diagnosed*

with endometriosis or any other condition for that matter. Complainant's testimony revealed that her doctor only speculated to her that the source of the cramping could be endometriosis. Complainant also presented a medical record dated six months past the date she was terminated from Respondent's employ, which she argued established that she had the disease. However, a close examination of the admitted portion of the medical record only revealed a "questionable history of endometriosis" before some unidentified time in 1999. The document is sketchy support for Complainant's case though, because the name of the person referred to in the document is blocked out along with the definite time frame of the speculative history of the condition. Therefore, it is too unreliable to establish Complainant was possibly afflicted with endometriosis.

I must note that it is not always necessary for a complainant to establish that she was actually diagnosed with a handicap to establish liability under the Act. Specifically, in the case of an allegation of *perceived* handicap discrimination where Complainant is not actually handicapped, but Respondent perceives her to be handicapped and takes some adverse action against her. See, ***Cavanaugh v. IDHR (A.E. Staley Manufacturing Co. Respondent on the underlying charge)***, ____ Ill. HRC. Rep.___ (charge No. 1995SF0624, January 9, 1998). However, this is inapplicable in cases such as the case at bar where the allegation of "perceived handicap" was not pleaded in the complaint. Because Complainant pleaded that she suffered an actual handicap, it was incumbent on her to establish that very fact at hearing.

In summary, considering Complainant's testimony with the admitted portion of one medical record from an irrelevant time frame to the case at bar, Complainant's case of handicap discrimination must fail because she did not show that she had endometriosis. At the conclusion of Complainant's case-in-chief at hearing, all Complainant had established was that she *might* have had endometriosis, and that was only conjecture. Without reliable evidence to establish the threshold issue that

Complainant suffered a handicap, a directed finding on the issue of handicap discrimination was proper.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission:

1. deny Complainant's motion for reconsideration;

2. uphold the directed finding in favor of Respondent; and

3. dismiss with prejudice the complaint of Lindy A. Lawrence against Norman Rubin, D.D.S., together with the underlying charge number 98SF0468.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Illinois Human Rights Commission

ENTERED THE 23RD DAY OF SEPTEMBER, 2002.